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No. 02-1824

In the
Supreme Court of the United States

Janie Cockrell, Director,
Texas Department of Criminal Justice,
Institutional Division,

Petitioner,

versus

Michael Wayne Haley,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION TO PROCEED IN FORMA PAUPERIS

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ATTORNEY FOR RESPONDENT

19 pp

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MOTION TO PROCEED IN FORMA PAUPERIS

Michael Wayne Haley, respondent in the above styled Petition for Certiorari, moves the court to proceed in forma pauperis and in support would show the court the following.

United States Fifth Circuit Court of Appeals found the respondent indigent and appointed undersigned counsel to represent the respondent before that court.

The respondent has been continuously incarcerated since his conviction, has no funds or assets, and is indigent.

Therefore, the respondent moves this court to proceed in this matter in forma pauperis.

Respectfully submitted,

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Certificate of Service

On this the 17th day of July, 2003, the foregoing Motion to Proceed In Forma Pauperis has been sent via fax and United States mail, certified, return receipt requested to:

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Eric M. Albritton

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Michael Wayne Haley, respondent in the above-entitled and numbered cause, files this brief in opposition in accordance with SUP. CT. R. 15. In support, the respondent will show the following.

ARGUMENT

I. ADDITIONAL DEVELOPMENT OF THE ISSUE IN THE COURTS OF APPEAL IS WARRANTED PRIOR TO THIS COURT RESOLVING THE CIRCUIT SPLIT

There is a circuit split concerning whether a procedurally defaulted claim may be reached on the merits (absent a showing of cause and prejudice) if the habeas petitioner is actually innocent of

the noncapital punishment he received.[1] See, e.g., United States v. Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999); Spence v. Superintendent, 219 F.3d 162, 172 (2nd Cir. 2000); Embrey v. Hershberger, 131 F.3d 739, 743 (8th Cir. 1997) (en banc); Reid v. Oklahoma, 101 F.3d 1369 (10th Cir. 1996); Hope v. United States, 108 F.3d 119 (7th Cir. 1997). Although there is a circuit split, additional development of the issue in the courts of appeal is warranted prior to the Court resolving the circuit split.

The circuit split discussed by the petitioner, while existent, is not as well developed as she maintains. Three of the cases cited by the petitioner to establish a circuit split, Hope, 108 F.3d at 119, Mikalajunas, 186 F.3d at 495 and Embrey, 131 F.3d at 743, are appeals concerning motions to vacate, correct, or set aside sentences filed pursuant to 28 U.S.C. § 2255, rather than writs of habeas corpus filed in accordance 28 U.S.C. § 2254. As such, comity and federalism concerns which impact the analysis concerning federal review of state judgments[2] are not present, and, therefore, diminish the value of these cases to the debate of the specific issue raised in this case.[3] See Sean L. Dalton, Note, Carved in Sand: Actual Innocence in United States v. Maybeck, 73 N.C. L. Rev. 2388, 2401-02 (1995).

Further, two of these cases, Hope and Embrey, concern the application of the actual innocence exception to successive petitions rather than procedurally defaulted claims. This distinction is relevant because successive petitions are governed by 28 U.S.C. §§ 2244 and 2255, while procedurally defaulted claims raised in an original 28 U.S.C. § 2254 petition are not.[4]

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") significantly changed a petitioner's ability to file a previously raised claim in a successive petition and strictly limits the circumstances under which claims that were not previously raised may be filed in a successive petition. Jake Sussman, Unlimited Innocence: Recognizing an 'Actual Innocence' Exception to the AEDPA's Statute of Limitations, 27 N.Y.U. Rev. L. & Soc. Change 343, 352 (2001/2002); Bryan A. Stevenson, The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases, 77 N.Y.U. L. Rev. 699, 710 (2002). The AEDPA treats successive petitions under 28 U.S.C. § 2254 differently than successive motions filed pursuant to 28 U.S.C. § 2255. Randal S. Jeffrey, Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues, 84 Marq. L. Rev. 43, 123-25 (2000). The AEDPA completely bars a petitioner from raising a claim

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[1]The "actual innocence exception" is also known as the "miscarriage of justice exception." Sawyer v. Whitley, 505 U.S. 333, 339 (1992). These phrases will be used interchangeably.

[2]See Younger v. Harris, 401 U.S. 37, 44 (1971); McCleskey v. Zant, 499 U.S. 467, 491 (1991); Wainwright v. Sykes, 433 U.S. 72, 90 (1977). See also The Supreme Court – Leading Cases, 100 Harv. L. Rev. 100, 246 (1986).

[3]Certainly, the consideration of finality – also a basis of the procedural default doctrine – is equally relevant in federal review of both federal and state judgments. See Murray v. Carrier, 477 U.S. 478, 495-96 (1986) (doctrine of procedural default is based on considerations of comity and finality). See also United States v. Frady, 456 U.S. 152, 165 (1982) ("a final judgment commands respect" without regard to whether the judgment comes from a federal or a state court).

[4]This Court has not drawn a distinction between review of procedurally defaulted claims and claims raised in a successive petition. In Sawyer, this Court broadly stated that "[u]nless a habeas petitioner shows cause and prejudice, a court may not reach the merits of: (a) *successive claims* that raise grounds heard and decided on the merits in a previous petition; (b) new claims, not previously raised, which constitute an *abuse of the writ*; or (c) *procedurally defaulted* claims in which the petitioner failed to follow applicable state procedural rules in raising claims." Sawyer, 505 U.S. at 339 (internal citations omitted) (emphasis in original). In fact, this Court has stated that "[t]he doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review." McCleskey, 499 U.S. at 490-91.

that he or she raised in a prior petition. 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). Cf. 28 U.S.C. § 2255.

Moreover, 28 U.S.C. § 2244(b)'s miscarriage of justice exception concerning a new claim in a successive petition replaces the less onerous standard to establish actual innocence of the crime articulated in Murray v. Carrier, 477 U.S. at 495, with the standard announced in Sawyer. Sussman, supra at 493. The Seventh Circuit, in Hope, 108 F.3d at 120, held that the AEDPA precludes application of the actual innocence exception unless the movant is actually innocent of the crime and not merely the sentence.[5] Accord In re Jones, 137 F.3d 1271, 1274 (11th Cir. 1998) (holding that AEDPA forecloses successive petition on the basis of newly discovered evidence unless it challenges conviction, not merely sentence). Cf. Babbitt v. Woodford, 177 F.3d 744, 746 (9th Cir. 1999) (interpreting the provision "as permitting a petitioner to establish by clear and convincing evidence, that but for constitutional error, no reasonable jury would have found petitioner eligible for the death penalty") (citation omitted). The cases cited by the petitioner do not address the impact of the amendments to the statute made by the AEDPA, and, as such, further development of this issue is required. See Jeffrey, supra at 137.

Only two of the cases cited by the petitioner concerning the circuit split, Reid, 101 F.3d at 1369[6] and Spence, 219 F.3d at 172, are appeals of habeas petitions filed in accordance with 28

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[5]In dicta, the court implies that the actual innocence exception set out in Sawyer does not survive the amendment to the statute. See id. at 120.

[6]Reid applied the rule originally announced in United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993) (appeal concerning a motion brought pursuant to 28 U.S.C. § 2255). Reid applied the "rules and case law controlling abusive and successive habeas petitions when the district court rendered its decision in December 1995, several months before passage of the

U.S.C. § 2254, and only Spence discusses the actual innocence exception in the context of a procedurally defaulted claim.

The issue raised in Reid concerns a successive petition, and, therefore, is necessarily governed by 28 U.S.C. § 2244 and raises the same questions surrounding the impact of the AEDPA. See Hope, 108 F.3d at 120 ("We conclude that a successive motion under 28 U.S.C. § 2255 (and presumably a successive petition for habeas corpus under section 2254, governing habeas corpus for state prisoners, which has materially identical language) may not be filed on the basis of newly discovered evidence unless the motion challenges the conviction and not merely the sentence."). Spence, although addressing a procedurally defaulted claim in a 28 U.S.C. § 2254 petition, is distinguishable from this case. Here, the Fifth Circuit addressed the actual innocence exception where the petitioner was ineligible for the habitual punishment he received; in Spence, the Second Circuit was called upon to address the actual innocence exception where a habeas petitioner was not subjected to habitual punishment.[7] Spence, 219 F.3d at 171.

The courts of appeal need to consider more fully whether a procedurally defaulted claim raised in a petition for habeas corpus filed in accordance with 28 U.S.C. § 2254 may be reached on the merits (absent a showing of cause and prejudice) if the habeas petitioner is actually innocent of

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Antiterrorism and Effective Death Penalty Act of 1996 . . .. However, [the court stated that it] would reach the same result under the even more restrictive standards contained in Title I of the AEDPA." Id. at n.2 (internal citations omitted).

[7]The Fifth Circuit's opinion, in dicta, rejects the Second Circuit's position by stating that the actual innocence exception should apply only in noncapital cases where the petitioner is sentenced as a habitual offender. See Haley v. Cockrell, 306 F.3d 257, 265 (5th Cir. 2002) (Haley I) ("[W]e agree with the Fourth Circuit which has held that the actual innocence exception applies to noncapital cases only in the context of a habitual offender finding during the punishment phase of the trial.").

the noncapital punishment he received before this Court grants certiorari. Specifically, the courts of appeal need to consider the impact of the AEDPA on whether the actual innocence exception continues to be equally applicable in the context of procedurally defaulted claims and successive or abusive petitions, the differing rationales for the rule underpinning review of federal judgments by federal courts and state judgments by federal courts, and the use of a habitual offender statute.

II. THE COURT OF APPEALS CORRECTLY APPLIED SUPREME COURT PRECEDENT AND, AS SUCH, THE ISSUE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW.

In Wainwright, 433 U.S. at 87, the Court held that a procedurally defaulted claim could be reached by a federal habeas court if the petitioner showed cause for the default as well as prejudice attendant to the alleged error. The Court discussed an exception to the requirement of establishing cause and prejudice in Murray v. Carrier, 477 U.S. 478 (1986). There, the Court held that a procedurally defaulted claim could be reviewed on the merits without the showing of cause and prejudice if the failure to do so would result in a fundamental miscarriage of justice. Id. at 496. Smith v. Murray, 477 U.S. 527 (1986), decided the same day as Murray v. Carrier, contemplated the applicability of this exception in the context of capital sentencing. In so doing, the Court acknowledged that actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." Id. at 537. Nevertheless, this Court in Sawyer, 505 U.S. at 348, held that a procedurally defaulted claim could be reviewed "if petitioner has shown by clear and convincing evidence that, but for constitutional error, no reasonable juror would find him eligible for the death penalty under [the applicable state law]."[8] This is an "eligibility" test.[9]

[8]This is a more onerous standard than required to establish actual innocence of the underlying offense. See Murray v. Carrier, 477 U.S. at 495 (a habeas petitioner must show that a "constitutional violation has probably resulted in the conviction of one who is actually

See Schlup v. Delo, 513 U.S. 298, 323 (1995). That is, there is a fundamental miscarriage of justice when the petitioner is ineligible under state law for the penalty assessed. Sawyer, 505 U.S. at 347.

The Sawyer eligibility test is narrow and easily applied to noncapital sentences. See Sawyer, 505 U.S. at 340 (the actual innocence exception is tailored to be narrow and subject to determination by relatively objective standards). "An individual is either eligible or not eligible to receive a particular sentence." Embrey, 131 F.3d at 744 (dissent). It is less difficult to apply in the context of a noncapital habitual enhancement error than in the context of a capital sentence. For instance, it is more difficult and less objective to determine whether a petitioner has shown by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found him or her to be a future danger as is required to be death eligible under Texas law or that "the offense was committed in an especially cruel, atrocious and heinous manner," as required by Louisiana law when Sawyer was tried,[10] than to determine whether the petitioner's prior felony convictions are sequential as required by Texas law.

This Court has never held that the actual innocence exception, articulated as an eligibility test in Sawyer, does not extend to cases involving challenges to a noncapital sentence and there is no principled reason to restrict the Sawyer analysis to capital sentences. Embrey, 131 F.3d at 743 (dissent). In fact, in Smith v. Murray, 477 U.S. at 538-39, this Court suggested "that the availability of [the] actual innocence exception depends not on the 'nature of the penalty' . . ., but on whether

innocent").

[9]The Court has recently addressed punishment eligibility in a series of cases. See, e.g., Jones v. United States, 526 U.S. 227 (1998); Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v. Arizona, 536 U.S. 584 (2002).

[10]Sawyer, 505 U.S. at 337 n.2.

the constitutional error 'undermined the *accuracy* of the guilt or sentencing determination.'" Spence, 219 F.3d at 170-71 (quoting Smith v. Murray, 477 U.S. at 538-39) (emphasis added).

The nature of the punishment is not a legitimate basis for differentiating capital and noncapital cases, and, therefore, capital petitioners and noncapital petitioners should not be afforded different measures of justice. Smith, 477 U.S. at 538-39 (rejecting the idea that "the principles of Wainwright v. Sykes apply differently depending on the nature of the penalty a State imposes for violation of its criminal law"); James J. Sticha, Note, To Be or Not To Be? The Actual Innocence Exception in Noncapital Sentencing Cases, 80 Minn. L. Rev. 1615, 1626-27 (1996); see also Herrera v. Collins, 506 U.S. 390, 405 (1993) (the death penalty does not mandate a higher standard of review in federal habeas); Murray v. Giarratano, 492 U.S. 1, 9 (1989) (same). The Fourth Circuit's logic on this point is compelling. Except for the obvious difference in the severity of the sentence, there is little difference between holding that a defendant can be innocent of the acts required to enhance a sentence to death and applying a parallel rationale in noncapital cases. United States v. Maybeck, 23 F.3d 888, 893 (4th Cir. 1994). Hence, a defendant in either a capital or noncapital case would, unless excepted from the cause and prejudice requirement, suffer the same general consequence (an enhanced sentence) from being held responsible for an act of which he or she is actually innocent. Id. Simply put, "[b]ecause the harshness of the sentence does not affect the habeas analysis and the ultimate issue, the justice of the incarceration, is the same, there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures." Spence, 219 F.3d at 171.

Furthermore, there is no procedural habeas rule that draws a distinction based on the punishment assessed. For instance, a petitioner must exhaust his state court remedies in capital and

noncapital cases. Similarly, no distinction is drawn between capital and noncapital cases when analyzing the presence of cause and prejudice for successive claims and abusive writs. See, e.g., Kuhlmann v. Wilson, 477 U.S. 436 (1986); McCleskey, 499 U.S. at 467. More to the point, however, the procedural default rule draws no distinction between defaults in capital cases and noncapital cases. As such, there is no reason why an exception to that rule should draw a distinction.

The Fifth Circuit logically extended this Court's precedent and correctly held that a procedurally defaulted claim may be reached on the merits (absent a showing of cause and prejudice) if the habeas petitioner is actually innocent of the noncapital punishment he received.[11] This conclusion is confirmed by the Court's unyielding recognition that the writ is an equitable remedy mandated by justice. See Kuhlmann, 477 U.S. at 447. "The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available." Sunal v. Large, 332 U.S. 174, 189 (1947) (Rutledge, J., dissenting). Accordingly, this Court should not grant certiorari.

III. THIS CASE IS NOT THE IDEAL VEHICLE FOR THE COURT TO CONSIDER WHETHER A PROCEDURALLY DEFAULTED CLAIM MAY BE REACHED ON THE MERITS (ABSENT A SHOWING OF CAUSE AND PREJUDICE) IF THE HABEAS PETITIONER IS ACTUALLY INNOCENT OF THE NONCAPITAL PUNISHMENT HE RECEIVED.

The respondent's claim arises in the context of a habitual offender sentence, and, as such, does not raise the broader issue of whether the actual innocence exception should apply when the habeas petitioner is ineligible for the unenhanced, noncapital sentence he received. The Court should grant certiorari in a case raising the broader issue because any statement made in the context of this case concerning the availability of the actual innocence exception in a case where the defendant was

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[11] Sticha, supra at 1647.

not subjected to habitual punishment will be dicta, thereby failing to sufficiently apprise bench and bar of the state of the law.

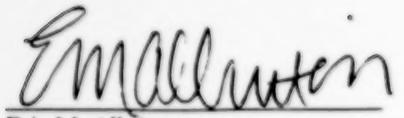
Further, this Court should not grant certiorari in this particular case because it can be granted in another case raising this issue where the wrongfully incarcerated person is not deprived of one day of his due liberty, such as a case where the habeas petitioner loses below, and is awaiting this Court's decision affirming the Court of Appeals. The respondent should not bear the burden of one additional day of admittedly unjust incarceration[12] so that this issue can be resolved when there are adequate alternative avenues available to resolve the issue at no cost to a wrongly incarcerated person.

CONCLUSION

Based on the reasons discussed above, the Court should not grant the petition for writ of certiorari.

[12]The petitioner admits that "there is no dispute that Haley's punishment was improperly enhanced under the statute." Petitioner's Petition for Writ of Certiorari at 5, Haley v. Cockrell (No. 02-1824).

Respectfully submitted.



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On this the 17th day of July, 2003, the foregoing Brief in Opposition has been sent via fax and United States mail, certified, return receipt requested to:

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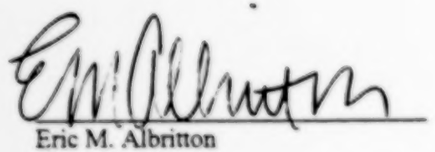

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